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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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| VICTOR TAGLE, |) | 3:16-cv-00148-MMD-WGC |
| |) | |
| Plaintiff, |) | REPORT & RECOMMENDATION |
| |) | OF U.S. MAGISTRATE JUDGE |
| vs. |) | |
| |) | Re: ECF No. 115 |
| STATE OF NEVADA, <i>et al.</i> , |) | |
| |) | |
| Defendants. |) | |

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Before the court is Defendant Corey Rowley’s Motion for Summary Judgment. (ECF Nos. 115, 115-1, 115-2.) Plaintiff filed a response. (ECF Nos. 124, 127.) Defendant filed a reply. (ECF No. 148.)

After a thorough review, it is recommended that Defendant’s motion be granted.

I. BACKGROUND

Plaintiff is an inmate in the custody of the Nevada Department of Corrections (NDOC), proceeding pro se with this action pursuant to 42 U.S.C. § 1983. (Compl., ECF No. 7.) The events giving rise to this action took place while Plaintiff was housed at Ely State Prison (ESP). (*Id.*) The only defendant is Corey Rowley.

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1 On screening, Plaintiff was allowed to proceed with a single claim of Eighth Amendment
2 excessive force against Rowley based on allegations that on March 3, 2016, Rowley dragged Plaintiff
3 to the point he could not walk, threw Plaintiff into a van door, and hit Plaintiff over the head multiple
4 times. (Screening Order, ECF No. 6.)

5 Defendant moves for summary judgment, arguing that Plaintiff failed to exhaust his
6 administrative remedies, and has no evidence to support his allegations of excessive force.

7 **II. LEGAL STANDARD**

8 **A. Summary Judgment**

9 "The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to
10 the facts before the court." *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th
11 Cir. 1994) (citation omitted). In considering a motion for summary judgment, all reasonable inferences
12 are drawn in favor of the non-moving party. *In re Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citing
13 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). "The court shall grant summary judgment
14 if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled
15 to judgment as a matter of law." Fed. R. Civ. P. 56(a). On the other hand, where reasonable minds could
16 differ on the material facts at issue, summary judgment is not appropriate. *See Anderson*, 477 U.S. at
17 250.

18 A party asserting that a fact cannot be or is genuinely disputed must support the assertion
19 by:

20 (A) citing to particular parts of materials in the record, including depositions, documents,
21 electronically stored information, affidavits or declarations, stipulations (including those
22 made for purposes of the motion only), admissions, interrogatory answers, or other
23 materials; or

24 (B) showing that the materials cited do not establish the absence or presence of a genuine
25 dispute, or that an adverse party cannot produce admissible evidence to support the fact.

26 Fed. R. Civ. P. 56(c)(1)(A), (B).

27 If a party relies on an affidavit or declaration to support or oppose a motion, it "must be made
28 on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or
29 declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

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1 In evaluating whether or not summary judgment is appropriate, three steps are necessary: (1)
2 determining whether a fact is material; (2) determining whether there is a genuine dispute as to a material
3 fact; and (3) considering the evidence in light of the appropriate standard of proof. *See Anderson*, 477
4 U.S. at 248-250. As to materiality, only disputes over facts that might affect the outcome of the suit
5 under the governing law will properly preclude the entry of summary judgment; factual disputes which
6 are irrelevant or unnecessary will not be considered. *Id.* at 248.

7 In deciding a motion for summary judgment, the court applies a burden-shifting analysis. "When
8 the party moving for summary judgment would bear the burden of proof at trial, 'it must come forward
9 with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at
10 trial.'...In such a case, the moving party has the initial burden of establishing the absence of a genuine
11 [dispute] of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*,
12 213 F.3d 474, 480 (9th Cir. 2000) (internal citations omitted). In contrast, when the nonmoving party
13 bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1)
14 by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by
15 demonstrating the nonmoving party failed to make a showing sufficient to establish an element essential
16 to that party's case on which that party will bear the burden of proof at trial. *See Celotex Corp. v.*
17 *Cartrett*, 477 U.S. 317, 323-25 (1986).

18 If the moving party satisfies its initial burden, the burden shifts to the opposing party to establish
19 that a genuine dispute exists as to a material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
20 475 U.S. 574, 586 (1986). To establish the existence of a genuine dispute of material fact, the opposing
21 party need not establish a genuine dispute of material fact conclusively in its favor. It is sufficient that
22 "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions
23 of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.
24 1987) (quotation marks and citation omitted). "Where the record taken as a whole could not lead a
25 rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*,
26 475 U.S. at 587 (citation omitted). The nonmoving party cannot avoid summary judgment by relying
27 solely on conclusory allegations that are unsupported by factual data. *Id.* Instead, the opposition must
28 go beyond the assertions and allegations of the pleadings and set forth specific facts by producing

1 competent evidence that shows a genuine dispute of material fact for trial. *Celotex*, 477 U.S. at 324.

2 That being said,

3 [i]f a party fails to properly support an assertion of fact or fails to properly address
4 another party's assertion of fact as required by Rule 56(c), the court may: (1) give an
5 opportunity to properly support or address the fact; (2) consider the fact undisputed for
6 purposes of the motion; (3) grant summary judgment if the motion and supporting
7 materials—including the facts considered undisputed—show that the movant is entitled
8 to it; or (4) issue any other appropriate order.

9 Fed. R. Civ. P. 56(e).

10 At summary judgment, the court's function is not to weigh the evidence and determine the truth
11 but to determine whether there is a genuine dispute of material fact for trial. *See Anderson*, 477 U.S. at
12 249. While the evidence of the nonmovant is "to be believed, and all justifiable inferences are to be
13 drawn in its favor," if the evidence of the nonmoving party is merely colorable or is not significantly
14 probative, summary judgment may be granted. *Id.* at 249-50 (citations omitted).

15 **B. Exhaustion**

16 The Prison Litigation Reform Act (PLRA) provides that "[n]o action shall be brought with
17 respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner
18 confined in any jail, prison, or other correctional facility until such administrative remedies as are
19 available are exhausted." 42 U.S.C. § 1997e(a). An inmate must exhaust his administrative remedies
20 irrespective of the forms of relief sought and offered through administrative avenues. *Booth v. Churner*,
21 532 U.S. 731, 741 (2001).

22 The failure to exhaust administrative remedies is "an affirmative defense the defendant must
23 plead and prove." *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (quoting *Jones v. Bock*, 549 U.S.
24 199, 204, 216 (2007)), *cert. denied*, 135 S.Ct. 403 (Oct. 20, 2014). Unless the failure to exhaust is clear
25 from the face of the complaint, the defense must be raised in a motion for summary judgment. *See id.*
26 (*overruling in part Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003) which stated that failure to
27 exhaust should be raised in an "unenumerated Rule 12(b) motion").

28 As such: "If undisputed evidence viewed in the light most favorable to the prisoner shows a
failure to exhaust, a defendant is entitled to summary judgment under Rule 56. If material facts are
disputed, summary judgment should be denied, and the district judge rather than a jury should determine

1 the facts [in a preliminary proceeding]." *Id.*, 1168, 1170-71 (citations omitted). "Exhaustion should be
2 decided, if feasible, before reaching the merits of a prisoner's claim. If discovery is appropriate, the
3 district court may in its discretion limit discovery to evidence concerning exhaustion, leaving until
4 later—if it becomes necessary—discovery related to the merits of the suit." *Id.* at 1170 (citing *Pavey v.*
5 *Conley*, 544 F.3d 739, 742 (7th Cir. 2008)). If there are disputed factual questions, they "should be
6 decided at the very beginning of the litigation." *Id.* at 1171.

7 Once a defendant shows that the plaintiff did not exhaust available administrative remedies, the
8 burden shifts to the plaintiff "to come forward with evidence showing that there is something in his
9 particular case that made the existing and generally available administrative remedies effectively
10 unavailable to him." *Id.* at 1172 (citing *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 n. 5 (9th Cir.
11 1996)); *Draper v. Rosario*, 836 F.3d 1072, 1080 (9th Cir. 2016) (inmate plaintiff did not meet his burden
12 when he failed to identify any actions prison staff took that impeded his ability to exhaust his
13 administrative remedies, or otherwise explain why he failed to comply with the administrative remedies
14 process). The ultimate burden of proof, however, remains with the defendant. *Id.*

15 The Supreme Court has clarified that exhaustion cannot be satisfied by filing an untimely or
16 otherwise procedurally infirm grievance, but rather, the PLRA requires "proper exhaustion." *Woodford*
17 *v. Ngo*, 548 U.S. 81, 89 (2006). "Proper exhaustion" refers to "using all steps the agency holds out, and
18 doing so *properly* (so that the agency addresses the issues on the merits)." *Id.* (quoting *Pozo v.*
19 *McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)) (emphasis in original). Thus, "[s]ection 1997e(a)
20 requires an inmate not only to pursue every available step of the prison grievance process but also to
21 adhere to the 'critical procedural rules' of that process." *Reyes v. Smith*, 810 F.3d 654, 657 (9th Cir.
22 2016) (quoting *Woodford v. Ngo*, 548 U.S. 81, 90 (2006)). "[I]t is the prison's requirements, and not the
23 PLRA, that define the boundaries of proper exhaustion." *Jones v. Bock*, 549 U.S. 199, 218 (2007). That
24 being said, an inmate exhausts available administrative remedies "under the PLRA despite failing to
25 comply with a procedural rule if prison officials ignore the procedural problem and render a decision on
26 the merits of the grievance at each available step of the administrative process." *Reyes*, 810 F.3d at 658.

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1 To reiterate, an inmate need only exhaust “available” administrative remedies. *See Ross v. Blake*,
2 136 S.Ct.1850, 1858 (2016). “Accordingly, an inmate is required to exhaust those, but only those,
3 grievance procedures that are ‘capable of use’ to obtain ‘some relief for the action complained of.’” *Id.*
4 at 1859 (quoting *Booth*, 532 U.S. at 738).

5 **III. DISCUSSION**

6 NDOC’s Administrative Regulation (AR) 740 governs the exhaustion process. (ECF No. 115-1.)
7 Under AR 740, an inmate is supposed to attempt to resolve grievable issues through discussion with
8 their caseworker, and then must complete three levels of grievance review—informal, first and second
9 levels— in order to exhaust administrative remedies. (*Id.* at 7-12.)

10 Defendant argues that Plaintiff filed no grievance regarding the alleged excessive force. A
11 grievance filed on June 29, 2016, passively states that “C. Rowley physically attacks,” but that reference
12 was insufficient to put Rowley on notice of an excessive force claim, and was filed past the deadline for
13 Plaintiff to have filed a grievance on this issue.

14 In his response, Plaintiff asks for dismissal of the motion and removal of Deputy Attorney
15 General Hardcastle. (ECF No. 124 at 1.) The opposition goes on to hurl various insults against Deputy
16 Attorney General Hardcastle, as well as Attorney General Adam Laxalt. Plaintiff also states that he
17 submitted an informal grievance on March 3, 2016, and that he had a copy but “Harlow took them, under
18 Hardcastle’s orders on 4/19/17, 6/7/17, 8/10/17 -present.” (ECF No. 124 at 2.)

19 Even taking Plaintiff’s bare statement in his opposition as true that he filed an informal level
20 grievance on March 3, 2016, and that he continued the grievance process a month later, he points to no
21 evidence that he completed the first and second levels for that grievance. Nor is this reflected in the
22 summary of his grievances submitted by Defendant. The court finds that Plaintiff’s vague statements that
23 documents were taken from him, with no pertinent details, and not made under oath or otherwise
24 supported by evidence are insufficient to raise an issue that administrative remedies were unavailable
25 to him.

26 Therefore, Defendant has demonstrated, and Plaintiff has failed to properly refute, that Plaintiff
27 failed to exhaust his administrative remedies with respect to his excessive force claim. The time period
28 for Plaintiff to exhaust administrative remedies for this claim has expired under AR 740; therefore,

1 Defendant's motion should be granted and summary judgment should be entered in his favor.

2 As a result of this finding, the court need not reach Defendant's argument concerning whether
3 Plaintiff has evidence to support the merits of his excessive force claim.

4 Finally, insofar as Plaintiff takes issue with Defendant having altered the caption in this case to
5 reflect that he is the only defendant and claims that he improperly dismissed parties from the case,
6 Plaintiff is mistaken. The other defendants were dismissed from this case on screening. (ECF No. 6.)
7 While Defendant should have moved to amend the caption to reflect the current status of the parties, the
8 error in failing to do so is harmless.

9 **IV. RECOMMENDATION**

10 **IT IS HEREBY RECOMMENDED** that the District Judge enter an order **GRANTING**
11 Defendant's motion for summary judgment (ECF No. 115), and entering judgment in Defendant's favor.

12 The parties should be aware of the following:

13 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to this
14 Report and Recommendation within fourteen days of receipt. These objections should be titled
15 "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points
16 and authorities for consideration by the district judge.

17 2. That this Report and Recommendation is not an appealable order and that any notice of appeal
18 pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until entry of
19 judgment by the district court.

20 DATED: October 5, 2017.

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22 WILLIAM G. COBB
23 UNITED STATES MAGISTRATE JUDGE
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